Supreme Court, U.S.
FILED
JAN 3 2007
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No. 06-1067

In The
Supreme Court of the United States

DAVID RAY GADDIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal district court dismiss an application for a writ of *coram nobis* on the basis of failure to pursue the claim diligently when the uncontroverted evidence establishes that the reason for not filing the claim sooner was the petitioner's inability, despite diligent efforts, to obtain an attorney to advise and represent him?

2. What are the guidelines for issuance of a writ of *coram nobis* on a claim of actual innocence and when does a federal court have the authority to refuse to hear a *coram nobis* claim of actual innocence on the basis of any reason other than the merits of the claim?

3. In a *coram nobis* action asserting actual innocence, is the applicant for the writ precluded from arguing that the trial evidence conclusively establishes that no crime was committed, by the fact that he argued on direct appeal that there was insufficient record evidence to prove fraudulent intent?

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The opinions are reprinted verbatim in the appendix.

JURISDICTION

The Tenth Circuit's dispositive opinion was filed on October 19, 2006. The Honorable Associate Justice Stephen Breyer extended the deadline for seeking certiorari to January 29, 2007. (application no. 06A709) The United States District Court's jurisdiction arose under the All Writs Act, 28 U.S.C. Section 165(a). This Court's jurisdiction arises under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. Section 1651

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On June 17, 1997, Mr. Gaddis was indicted in the United States District Court for the Western District of Oklahoma for violation of 18 U.S.C. Sections 371, 1343,

1957(a) and 1956(a)(1)(B)(i). The gravaman of the Indictment was that Mr. Gaddis was involved in an alleged scheme to defraud Sears, Roebuck and Company (Sears) of money. The Indictment alleged that Mr. Gaddis owned and operated International Services Corporation (ISC) in a business partnership with Sears for the purpose of selling installation services, and that he had used the partnership to submit fraudulent invoices to Sears, falsely representing that installation services had been performed when, in fact, no such work had been performed. The legal name of the partnership between ISC and Sears was Sears commercial Installation Services (SCIS), a general partnership formed under Illinois law. ISC and Sears were general partners of SCIS and each owned one-half interest.

In February 1998, Mr. Gaddis' first trial resulted in a mistrial as the jury was unable to reach a verdict. His second trial resulted in guilty verdicts on one count of conspiracy, three counts of wire fraud, four counts of engaging in monetary transactions derived from unlawful activities, and one count of money laundering. On June 19, 1998, Mr. Gaddis was sentenced to 46 months' incarceration, three years' supervised release, $450 special assessment and restitution in the amount of $309,000.00. Mr. Gaddis was tried in the United States District Court for the Western District of Oklahoma before the Honorable Robin Cauthron.

Mr. Gaddis appealed his convictions to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed his convictions. *United States v. Gaddis*, 198 F.3d 259 (Table), text at 1999 WL 824416 (October. 15, 1999).

Mr. Gaddis filed a motion seeking relief pursuant to 42 U.S.C. Section 2255. On June 28, 2000, the District

Court denied the motion. Mr. Gaddis appealed to the Tenth Circuit Court of Appeals. The District Court's denial of relief was affirmed by the Tenth Circuit. *United States v. Gaddis*, 12 Fed.App. 733 (10th Cir. 2001). The Section 2255 action was prosecuted by Mr. Gaddis while he was incarcerated within the federal prison system.

At the time of submitting the Section 2255 application, Mr. Gaddis was incarcerated and the majority of evidence that later was found was in a storage unit under the possession of his estranged wife. Gaddis' 2255 action contained a request for counsel who could obtain all the evidence and present it to the courts. The request was denied. Mr. Gaddis was thus prevented from obtaining the evidence he needed until after he was released. That is why he eventually had to resort to an application for a writ of *coram nobis*.

Following his release from prison, Mr. Gaddis filed a motion for a writ of error *coram nobis*. Therein, Mr. Gaddis argued his actual innocence based on the evidence not available previously. The district court denied his application for the writ and the Tenth Circuit affirmed the denial.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE AVAILABILITY OF THE WRIT OF *CORAM NOBIS* FOR INDIVIDUALS ASSERTING CLAIMS OF ACTUAL INNOCENCE.

This Court should grant certiorari in this case in order to establish guidelines and standards applicable to the All Writs Act, specifically the writ of *coram nobis*. The All

Writs Act sets forth no affirmative defenses for the Government. For example, there is no statute of limitations or time period prescribed or time period for filing applications for the writ. There are no statutory guidelines establishing procedural barriers for a writ of *coram nobis*.

Here, the Oklahoma federal district court and the Tenth Circuit refused to hear Mr. Gaddis' claim on the merits. These courts asserted that Mr. Gaddis did not act with due diligence and that he had previously asserted a similar claim at an earlier point of the proceedings. Mr. Gaddis, who at the time, of his release from incarceration, was not represented by counsel, had no guidance from any federal statute or court case, which would have led him to believe that he was not acting with due diligence. Here, this Court has an important question to answer: Does the seeking of an attorney to handle a legal matter amount to a lack of diligence? Neither the federal district court nor the Tenth Circuit Court of Appeals cites any statutory authority or any ruling from this Court or any other court that waiting to file a writ until counsel is obtained amounts to due diligence. The statutory language of the All Writs Act appears to allow filing at any time. At minimum, Mr. Gaddis should have been able to present testimony and evidence at an evidentiary hearing to show that he had acted with due diligence. The lower courts do not state how the Government was harmed by the lacked or "diligence" on Mr. Gaddis' part. Certainly, such a burden should be imposed before an innocent man is shut off from asserting a claim for relief under the All Writs Act.

Mr. Gaddis was released from incarceration on or about March 26, 2001. While he was incarcerated, his wife obtained a divorce and maintained possession of records pertaining to his case. Upon release from incarceration, Mr. Gaddis was placed in a halfway house but was unable

to retrieve the records because they had been locked in a storage unit by his then-former wife and he could not afford to pay the storage fees which had accrued.

In the summer of 2001, Mr. Gaddis was able to pay the storage fees and only then did he obtain possession of the records. In reviewing them, Mr. Gaddis discovered a document that he did not remember seeing. The document was a report prepared by a law firm which had been retained by Sears to investigate his submission of allegedly false claims. The report strongly tended to exonerate Mr. Gaddis. The evidence would now show that the way Mr. Gaddis attempted to obtain payment, that had been the basis for his conviction, had actually been proper under the partnership agreement.

The evidence that Mr. Gaddis desired to show the federal court was that the transaction in which he had been found guilty of federal crimes had actually been approved by Sears and the manner of submitting claims had actually been mandatory according to the provisions of the Partnership Agreement. There was no *corpus delicti* of the crime. Mr. Gaddis desired to show the federal district court that he had been incarcerated for over three years and continued to face a huge restitution order, all because he had engaged in business conduct authorized by certain contracts, which, not only were not a violation of the law, but were not even violation of general contract law.

Mr. Gaddis was unable to obtain counsel to assist him. He diligently attempted to obtain counsel. He submitted to the district court a detailed affidavit describing his repeated, unsuccessful attempts to hire a lawyer. The Respondent did not offer any evidence to contest his affidavit.

Mr. Gaddis' trial lawyer did not present the issue that Mr. Gaddis tried to submit to the federal district judge and

the Tenth Circuit Court of Appeals. Mr. Gaddis desired to present the issue that no crime had occurred. This issue of insufficient evidence was different than the issue of insufficient evidence which had previously been asserted on his behalf.

The lower courts presented no authority to support their holding that Mr. Gaddis had not acted diligently. Mr. Gaddis desired to have an attorney assist him. His diligence in this matter is shown by the fact that during the Section 2255 proceeding he had asked for the appointment of an attorney and had been denied and by the facts set forth in the affidavit he filed in the district court.

This Court has acknowledge the difficulty of proceeding *pro se.* Justice Ginsberg in *Halbert v. Michigan*, 545 U.S. 605 (2005), wrote: "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson." The task of presenting this difficult issue and having it heard properly is too onerous to expect from a layperson. Here, the district court and the appellate court seems to impose a requirement of *pro se* representation. This requirement is difficult to accept especially when there is no set time line for "due diligence." How was Mr. Gaddis to know that he was under a "diligence" requirement and that he had to file sooner than he did? How was he to know when to file the case? How was he supposed to know when to give up on attempting to have a lawyer handle his case? These questions are the types of questions that this Court must face.

The granting of the writ of certiorari is not only important from the standpoint of establishing guidelines concerning the writ of *coram nobis* but is also important to Mr. Gaddis individually. Mr. Gaddis continues to maintain his innocence and has no other writ or legal recourse to

establish his innocence and to set aside the judgment and sentence. Although Mr. Gaddis has served his prison term, he remains under the legal effect of the district court's restitution order that he pay more than $300,000.

This Court has recognized that persons asserting their actual innocence must be given some leeway with regard to procedural requirements. *See Schlup v. Delo*, 513 U.S. 298, 320-25 (1995) ("Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence . . . The overall importance of this greater individual interest merits imposing a somewhat less exacting standard . . . to a petitioner alleging a fundamental miscarriage of justice") This Court should grant certiorari to allow the continued vitality of the writ of *coram nobis* to those claiming their actual innocence. This Court has accepted the vitality of the writ of *coram nobis* previously. *United States v. Morgan*, 346 U.S. 502 (1954). The Court should act in this case to again establish the right of the innocent to, at minimum, be allowed to present their claim on the merits.

Respectfully submitted,

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2006 WL 2949149

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID RAY GADDIS, Defendant-Appellant.	No. 05-6390 (D.C. No. 00-CV-387-C) (W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ, HOLLOWAY,** and **BALDOCK,** Circuit Judges.

(Filed Oct. 17, 2006)

This case is before us on defendant-appellant David Gaddis' appeal from the district court's order denying his motion for writ of error coram nobis and the court's denial

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

of his motion to reconsider that order. Mr. Gaddis was convicted by a jury of nine criminal counts related to his activities in defrauding his business partner Sears, Roebuck and Company, by submitting phony invoices for installation services that were never performed. Mr. Gaddis appealed his conviction and, when his conviction was upheld by an order and judgment, *see United States v. Gaddis,* 198 F.3d 259 (table), No. 98-6273, 1999 WL 824416 (10th Cir. Oct. 15, 1999), also filed a motion under 28 U.S.C. § 2255. His § 2255 motion was denied as was his appeal from that denial, *see United States v. Gaddis,* 12 F.App'x. 733 (10th Cir. 2001).[1]

Following his release from prison, Mr. Gaddis filed his motion for a writ of error coram nobis. In his motion Mr. Gaddis argued that he should be granted relief because his trial lawyer had been ineffective for not arguing that his contractual agreement with Sears allowed him to charge for installations that he had not yet completed. He further argued that this ineffectiveness was proven by a memorandum "prepared by a law firm which had been retained by Sears" that "strongly tended to exculpate him." Appellant's Appendix at 31.

The district court denied his motion on two grounds: (1) that Mr. Gaddis had not shown due diligence in filing his motion for a writ of error coram nobis in that the only reason he gave for waiting almost two years after his release from prison to file the motion was that he had been unable to find an attorney to represent him, and (2) that

[1] The full facts regarding Mr. Gaddis' case are set forth in the above-referenced orders and judgments of this court and need not be repeated here.

he had argued that there was insufficient evidence to support his conviction on direct appeal and in his § 2255 proceedings and that coram nobis relief is not available to relitigate issues. The district court also denied Mr. Gaddis' request for an evidentiary hearing on his claims and subsequently denied his motion to reconsider which was in substance a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e).

On appeal, Mr. Gaddis argues that it was not a failure of due diligence to wait two years to file his motion because he should not have been expected to file the motion pro se. He further asserts that while it was previously argued that he did not have the necessary intent to commit the crime for which he was charged, his motion for coram nobis relief sought to argue that the invoices in question were proper under the terms of the contract and, therefore, no crime was committed. He also argues that it was therefore error for the district court not to have held an evidentiary hearing.

On appeal, we review factual findings for clear error, *Blanton v. United States,* 94 F.3d 227, 230 (6th Cir. 1996), and questions of law de novo, *United States v. Mandanici,* 205 F.3d 519, 524 (2d Cir. 2000). We review the district court's ultimate decision to deny the writ of error coram nobis for an abuse of discretion. *Id.*

Keeping the above standards foremost in mind, we have carefully reviewed the parties' briefs and appendices. For the reasons set forth in the district court's October 12, 2005, Memorandum Opinion and Order and the district court's November 3, 2005, Memorandum Opinion and

Order, we **AFFIRM** the denial of Mr. Gaddis' motion for writ of error coram nobis and his motion to reconsider.

Entered for the Court

William J. Holloway, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case Number CR-97-105-C
DAVID RAY GADDIS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 3, 2005)

Before the Court is Defendant's Motion to Reconsider and, in the Alternative, Motion for Relief Under FRCP 50, 59, & 60. In his motion, Defendant identifies eight purported errors committed by the Court when it denied his request for *coram nobis* relief. In the accompanying brief, Defendant provides argument in support of only two of those errors. However, Defendant has failed to raise any issue warranting a reversal of the Court's earlier decision.

In his brief, Defendant argues the Court erred by determining he had failed to exercise due diligence in pursuing his quest for *coram nobis* relief. Defendant argues the Court failed to provide any authority to support the finding that actively seeking the assistance of counsel was not exercising diligence. Defendant's argument misses the point. As the Court noted in its earlier Order, Defendant has the burden to establish the right to relief. "It is presumed that the proceedings leading to the conviction were correct . . . and the burden is on the petitioner to demonstrate that the asserted error is jurisdictional or constitutional and results in a complete miscarriage of

justice," *Klein v. United States*, 880 F.2d 250, 253 (10th Cir. 1989) (citations omitted). Part of that burden is proof that Defendant exercised due diligence in seeking relief. *Id.* at 254 ("Klein failed to exercise due diligence in seeking the writ, a prerequisite to relief. *See Hirabayashi v. United States*, 828 F.2d 591, 604-605 (9th Cir. 1987) (petitioner must show valid reasons for not attacking the conviction earlier)."). Defendant in his earlier briefing and in the present motion has failed to satisfy his obligation. As the Court noted, Defendant did not file the present motion for nearly two years after being released from prison and he has failed to offer evidence demonstrating he acted with due diligence in that time period. Indeed, as the Court noted in its earlier Order, the only reason for the delay offered by Defendant is his attempt to secure counsel. However, Defendant has no right to counsel when pursuing a collateral attack on his conviction. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987):

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, *see Johnson v. Avery*, 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. *Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Thus, Defendant cannot rely on seeking counsel as an excuse for the delay in pursing *coram nobis* relief.

The second argument set out in Defendant's brief asserts the Court's determination that he had previously raised certain arguments in his direct appeal and 28 U.S.C. § 2255 motion is in error. According to Defendant, although the facts on which his present argument is based were raised in the previous motions, the present theory – the lack of evidence establishing that a crime had been committed – has never been litigated. The Court disagrees. As noted in the Order denying *coram nobis* relief, Defendant's direct appeal and his § 2255 motion argued that the evidence submitted by Plaintiff failed to demonstrate a crime had been committed. Defendant's attempts to distinguish his present arguments is unpersuasive. The evidence adduced at trial was sufficient to find Defendant guilty of the crimes charged.

The remainder of the arguments raised in Defendant's motion are undeveloped and on their face raise no issue warranting reconsideration of the Court's previous Order.

As set forth more fully herein, Defendant's Motion to Reconsider and, in the Alternative, Motion for Relief Under FRCP 50, 59, & 60 (Dkt. No. 166) is DENIED.

IT IS SO ORDERED this 3rd day of November, 2005.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case Number CR-97-105-C
DAVID RAY GADDIS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 12, 2005)

Before the Court is Defendant's Motion for Writ of Error Coram Nobis. Plaintiff filed a Response, to which Defendant filed a Reply. This matter is now at issue.

Defendant seeks the writ to reverse, dismiss, or otherwise vacate his conviction and sentence. According to Defendant, this relief is necessary because he is actually innocent of the crimes for which he stands convicted. Plaintiff denies Defendant is entitled to any relief and notes that Defendant has challenged his conviction three times, by direct appeal, by filing a 28 U.S.C. § 2255 motion with this Court, and then appealing the Court's decision on that § 2255 motion. Plaintiff notes that at every turn Defendant's conviction has been upheld.

On June 17, 1997, an indictment was returned, charging Defendant with violations of 18 U.S.C. §§ 371, 1343, 1957(a), and 1956(a)(1)(B)(1). The first trial ended when the jury was unable to reach a verdict; Defendant was convicted in a second trial and sentenced to a term of 46 months, and ordered to pay a substantial sum in

restitution. Defendant has now completed sentence of imprisonment, but alleges he still suffers the effects of a felony conviction and therefore is eligible for the relief sought herein. In support of his motion, Defendant asserts his trial counsel was ineffective in that she failed to understand that his actions and those of Mr. Aitken, the alleged co-conspirator, did not amount to a crime. Defendant argues the evidence plainly shows the invoices were neither false nor fraudulent and that Sears was required to pay each of them. Therefore, there was insufficient evidence to convict Defendant of the charged crimes. Defendant's current counsel argues his trial counsel failed to understand the operative language of the governing agreements and thereby allowed Plaintiff to mislead the jury about the existence of a crime.

The writ of coram nobis is an "extraordinary remedy" allowed "only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511 (1954) "To be entitled to [coram nobis] relief, the petitioner must demonstrate (1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which would probably have altered the outcome of the challenged proceeding had it been known." *United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001). The Tenth Circuit has stated that Defendant has the burden to establish the right to relief. "It is presumed that the proceedings leading to the conviction were correct . . . and the burden is on the petitioner to demonstrate that the asserted error is jurisdictional or constitutional and results in a complete miscarriage of justice." *Klein v. United States*, 880 F.2d 250, 253 (10th Cir. 1989) (citations omitted).

Here, Defendant has failed to satisfy that burden on two fronts. First, he has failed to demonstrate he exercised due diligence in pursuing the writ. Defendant completed his sentence and was released from prison on September 4, 2003, but he did not file the present motion until July 25, 2005. Defendant argues that he spent that time trying to find counsel but could not afford the required retainer. However, Defendant has failed to offer any authority demonstrating counsel was required to present this matter. Indeed, the nature of Defendant's argument, that he was actually innocent and that the plain language of the agreements allowed him to act as he did, seems clearly within the ability of a pro se litigant. Defendant offers no explanation of why he did not timely pursue this matter pro se and on that ground alone the motion may be denied. *Id.* at 254.

Defendant's motion is without merit for an additional reason. The basis for Defendant's motion is that his trial counsel failed to appreciate that the plain language of the agreements permitted him to bill and receive payment prior to performing any work. Defendant made this argument in his direct appeal: "Mr. Gaddis asserts that the evidence failed to demonstrate that he intended to defraud Sears. He contends that he was properly conducting business in the manner legitimately authorized and directed by Aitken." *United States v. Gaddis*, Case No. 98-6273, 1999 WL 824416, **3 (10th Cir. Oct. 15, 1999). And the argument was repeated in his motion pursuant to 28 U.S.C. § 2255.

> Although the motion itself is couched in terms of ineffective assistance of counsel, the

> brief in support of the motion clearly demonstrates that the defendant's arguments are to the sufficiency of the evidence, not the sufficiency of counsel's performance. In page after page, defendant summarizes his view of the evidence at trial and attempts to demonstrate that it does not support the verdict.

June 28, 2000, Order Denying 28 U.S.C. § 2255 Motion. "*Coram nobis* relief is not available to litigate issues already litigated; it is reserved for claims which have yet to receive their first disposition." *Klein*, 880 F.2d at 254 n.1.* Thus, coram nobis does not provide Defendant with yet another bite at the apple and his request may be denied on this basis.

Defendant requests an evidentiary hearing so that he may present evidence that his trial counsel failed to understand the significance of the agreements and the fact that the plain language of those agreements precluded a finding of guilt. As noted above, Defendant may not relitigate this issue through the present motion; accordingly, there is no reason to hold an evidentiary hearing.

As set forth more fully herein, Defendant has failed to demonstrate that he exercised due diligence in seeking the writ and the issues he seeks to pursue have previously been fully and finally litigated. Accordingly, Defendant's

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* In his opening brief, Defendant also argued the existence of newly discovered evidence, namely a memo which Defendant claims was exculpatory. However, Defendant filed an amendment recognizing that the memo was in fact known at the time of trial. Accordingly, there is no evidence from Defendant of newly discovered evidence warranting issuance of the writ.

Motion for Writ of Error Coram Nobis (Dkt. No. 141) is DENIED. A separate judgment will issue.

IT IS SO ORDERED this 12th day of October, 2005.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	No. CR-97-105-C
DAVID RAY GADDIS, Defendant	)	Civ-00-387-C

ORDER

(Filed Jun. 28, 2000)

Defendant timely filed this motion attacking his conviction and sentence under 28 U.S.C. § 2255. The government has responded in opposition and the matter is fully briefed.

In February 1998, defendant's first trial resulted in a mistrial when the jury was unable to reach a verdict. His second trial resulted in guilty verdicts on one count of conspiracy, three counts of wire fraud, four counts of engaging in monetary transactions derived from unlawful activities, and one count of money laundering. On June 19, 1998, defendant was sentenced to 46 months' incarceration, 3 years' supervised release, $450 special assessment, and restitution in the amount of $309,000.00. His conviction was affirmed on all counts. *United States v. Gaddis*, 198 F.3d 259 (Table), text at 1999 WL 824416 (Oct. 15, 1999). In this motion, defendant raises a claim of ineffective assistance of trial counsel, arguing counsel's failure to "challenge the fatally defective indictment" as it applied to the separate crimes, constituted ineffective assistance. In his amended motion, filed with permission of the Court,

defendant additionally alleges ineffective assistance of counsel due to trial counsel's failure to investigate governmental misconduct in this case. A second amended motion, filed without leave, restates and expands the allegations of the amended motion.

Although the motion itself is couched in terms of ineffective assistance of counsel, the brief in support of the motion clearly demonstrates that defendant's arguments are to the sufficiency of the evidence, not the sufficiency of trial counsel's performance. In page after page, defendant summarizes his view of the evidence at trial and attempts to demonstrate that it does not support the verdict. The sufficiency of the evidence is a matter which was raised and rejected on direct appeal. Absent an intervening change in the law, which is neither present nor alleged in this case, issues disposed of on direct appeal will not be considered in a collateral attack raised by a § 2255 motion. *United States v. Burk*, 62 F.3d 1429 (Table), 1995 WL 462377 (10th Cir. 1995), *cert. denied*, 516 U.S. 1151 (1996); *United States v. Prichard*, 875 F 2d 789, 791 (10th Cir. 1989).

To the extent defendant's challenge may go beyond an attack on the sufficiency of the evidence and present an ineffective assistance of counsel claim, it still must fail. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both deficient performance on the part of counsel and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, a defendant must prove the commission of errors so serious that counsel did not act as the "counsel" guaranteed by the Sixth Amendment. *Id.* This requires a showing that counsel's representation fell below an objective standard of reasonableness, when measured by prevailing professional

norms. *Id.* Performance must be evaluated from the counsel's perspective at the time of the alleged error and in light of all circumstances, and the standard is highly deferential. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Strategic choices made with the knowledge of the law and the facts are virtually unchallengeable, *Strickland*, 466 U.S. at 691, and the Court must indulge a strong presumption that any challenged action "might be considered sound trial strategy." *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Here, defendant merely asserts unsubstantiated and conclusory allegations regarding counsel's failure to investigate sufficiently to discover that the facts and evidence did not support the convictions. The defendant bears the burden of identifying specific acts or omissions of counsel which fail to reach the level of reasonable professional judgment. *Strickland*, 466 U.S. at 690. Conclusory allegations are insufficient. *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994). The allegations presented are simply too speculative, and too far-fetched, to meet this burden.

Accordingly, defendant's motion for relief under § 2255 is denied. His second amended complaint is stricken, and his request for court-appointed counsel and discovery are denied. A judgment will enter accordingly.

IT IS SO ORDERED this 28 day of June, 2000.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE